

REMARKS/ARGUMENTS

This is in response to the Final Office Action dated June 18, 2009. Reconsideration is respectfully requested.

Double Patenting

The Examiner provisionally rejects claims 1-5 and 9-14 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-10 of co-pending application no. 10/570,039.

Applicant respectfully submits that a Notice of Abandonment was mailed on August 4, 2009 in the 10/570,039 application, which Abandonment renders the provisional obviousness-type double patenting moot.

Claim rejections under 35 USC § 103

The Examiner rejected Claims 1-5 and 9-14 as being unpatentable over Nomura et al in view of Hautmann et al.

In response, Applicant submits that the Nomura reference simply shows a container 1 holding a composition 4 which rises through a cylindrical wick 2 to a volatizing plate in order to effect a volatilization suppressing effect. Applicant agrees with the Examiner that the primary reference of Nomura does not include a diffusion surface on its volatizing plate 3. The Examiner states that Hautmann would teach an apparatus with a reservoir 1 having a diffusing surface 2 with capillary channels 12 and an aperture 14. Therefore, the Examiner concludes that it would have been obvious to one having ordinary skill in the art to have provided the device of Nomura with capillary channels as suggested by Hautmann et al. Applicant disagrees.

Briefly, the secondary reference of Hautmann provides a device for dispensing an active liquid substance into the rinse water of a toilet bowl. There is no mechanism within the dispenser for diffusing vapors. The Hautmann dispenser includes a container holding the liquid active ingredient, which is located above a plate-shaped distributor having grooves arranged, inter alias, possibly horizontally and vertically. The active liquid substance that flows onto the distributor element is rinsed away by the flushing water of the toilet. The intersecting grooves or channels of

horizontal and vertical orientation are designed such that a first group of grooves runs outward from the distributor while the other second group of grooves only runs within the distributor so as to reach certain areas of the toilette. After flushing, the active liquid substance in the channel grids will simply evaporate and freshen the air in the area of the toilet bowl. The distributor provided by Hautmann is essentially defined by the intersecting grooves, or channel grid. A first group of grooves releases the preferably liquid active substance outward from the distributor toward the toilet bowl, and a second group of grooves distributes the liquid active substance within the distributor. The second group of grooves preferably has a larger open cross-section and distributes the active substance within the distributor to the grooves that lead outward.

In contrast, Applicant's invention as claimed is solely based on moving a volatile liquid by a wick-type transfer member to a capillary sheet for evaporation. The capillaries are designed such that they do not intersect so that the active liquid can travel along and evaporate and diffuse. A claim is properly rejected as obvious over a reference only when the differences between the claimed subject matter and the reference would have been obvious to a person of ordinary skill in the field at the time that the claimed invention was made. In addition, when an obviousness rejection is made over a combination of references, as here, it must also have been obvious to a person of ordinary skill to combine the references as suggested by the Examiner.

Applicant's claim is different from the combination of references in ways which would not have been obvious. It would not have been obvious to make the combination of the apparatus of the volatilization suppressing agent and the apparatus for dispensing substance into toilette rinse water. Under *KSR, Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007) there need not be any teaching, suggestion or motivation for the combination, but there must be an indication that the combination is no more than the predictable use of known elements according to their established functions, and there is a reason to combine the known elements. This is not the case here. The primary reference provides a system for volatilizing a composition and controlling the valorization according to temperature by introducing various solubilizing agents into the composition. The secondary reference of Hautmann provides basically a cleaning solution that flows by gravity onto a plate with intersecting grooves. From there it is flushed by the toilette flushing mechanism down into the bowl. The grooves are exposed to the flushing water and they direct the water into areas of the bowl where the active solution is needed most. Since the liquid active

substance is not closed off, it remains on the distributor until the next flushing is initiated. Applicant's claim calls for a curved fibrous diffusion surface adapted to receive the liquid from the transfer member and facilitate its evaporation into the atmosphere, the diffusion surface extending essentially laterally from the transfer member and comprising at least one non-integral, non-porous sheet bearing a surface including non-intersecting capillaries, having an extent and a capillarity sufficient to allow an appropriate evaporation. Hautmann's distributor plate suitable for holding up under constant flushing toilette water, may only resemble somewhat Applicant's diffusion surface, but a person of ordinary skill would not combine the references to achieve Applicant's goal of providing volatile liquid material to the atmosphere.

The court in a post-KSR opinion in In re Kubin, 561 F.3d 1351 (Fed. Cir. 2009) waded through the obvious-to-try-test discussed in In re O'Farrell 853 F.2d 894 (Fed. Cir. 1988), and in In re Deuel 51 F.3d 1552 (Fed. Cir. 1995) and, with deference to the opinion of the Supreme Court in KSR, affirmatively stated the implicit indication from O'Farrell that obvious-to-try is a proper standard in certain situations.

Specifically, the court in Kubin held that there are two situations in which obvious-to-try is an appropriate argument under § 103, namely, 1) where a skilled artisan merely pursues "known options" from a "finite number of identified, predictable solutions," and 2) where the improvement is no more than the predictable use of prior art elements according to their established functions. Kubin, 561 F.3d at 1359, quoting KSR, 550 U.S. at 417 and 421.

Conversely, the court in Kubin reiterated that obvious-to-try is an improper argument 1) where what would have been allegedly obvious-to-try was to vary all parameters or try each of numerous possible choices until arriving at a successful result, where the prior art gave either no indication of critical parameters or any other direction as to which of many possible choices was likely to be successful, and 2) where what was allegedly obvious-to-try was to explore new technology or a general approach that seemed promising, where the prior art gave only general guidance as to the particular form of the claimed invention or how to achieve it.

Accordingly, a skilled artisan could not merely pursues "known options" from a "finite number of identified, predictable solutions," here and in addition, a skilled artisan would not consider 2) the improvement as no more than the predictable use of prior art elements according to their established functions. Thus, Applicant submits that the combination of references does not

render the invention, as claimed in amended claim 1 as obvious.

. Applicant submits that the combination of references does not render claims 6 and 7 obvious. The additional reference He only provides the a wick comprise material pliable enough then when larger portion is inserted into an opening 108 (not shown), portion sufficiently contracts to fit through the opening 108, yet after passing through the opening 108, the portion sufficiently expands back to a diameter larger than the opening 108.

Applicant's transfer member maintains its form and simply accepts the diffusion surface with the non-porous sheet by press-fit.

The Hi reference in combination with the previously discussed references does not render claims 6 and 7 obvious.

Lastly, the Examiner rejects claims 8, 15-20 as being unpatentable over Nomura et al in view of Hautmann et al further in view of Greatbatch et al. Although Greatbatch shows a groove in the wick 50, such groove is designed to accept a flexible collar 55 which holds the wick in the container. Applicants groove at the rod-like conical transfer member engages with the diffusion surface. Thus, claims 8, 15-20 are not obvious over Nomura in view of Hautmann and further in view of Greatbatch .

Applicant respectfully submits that all claims, as amended, are patentable over the references cited.

CONDITIONAL PETITION FOR EXTENSION OF TIME

If entry and consideration of the amendments above requires an extension of time, Applicants respectfully request that this be considered a petition therefor. The Assistant Commissioner is authorized to charge any fee(s) due in this connection to Deposit Account No. 14-1263.

ADDITIONAL FEE

Please charge any insufficiency of fees, or credit any excess, to Deposit Account No. 14-1263.

Respectfully submitted,
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